United States Court of Appeals

for the Second Circuit

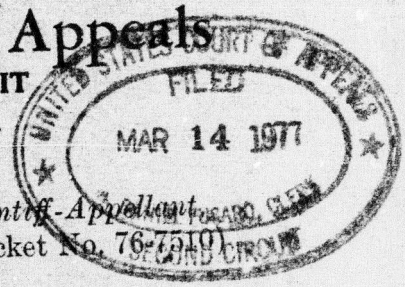
BRIEF FOR APPELLEE

ORIGINAL

76-7510/62

To be argued by:
ROBERT E. DALEY

United States Court of Appeals
FOR THE SECOND CIRCUIT



ELGIE & COMPANY,
Plaintiff-Appellant,
(Docket No. 76-7510)

against

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,
Defendant-Appellee and
Third-Party Plaintiff-Appellant,
(Docket No. 76-7562)

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THIRD-PARTY DEFENDANT-APPELLEE

HILL RIVKINS CAREY LOESBERG & O'BRIEN
Attorneys for Third-Party
Defendant-Appellee
96 Fulton Street
New York, New York 10038

Of Counsel:
ROBERT E. DALEY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals
FOR THE SECOND CIRCUIT

ELGIE & COMPANY,

Plaintiff-Appellant,
(Docket No. 76-7510)

against

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third-Party Plaintiff-Appellant,
(Docket No. 76-7562)

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

BRIEF FOR THIRD-PARTY DEFENDANT-APPELLEE

Statement

Third-Party Defendant-Appellee (hereinafter referred to as "I.T.O.") incorporates herein and makes a part hereof, the preliminary statement of the Defendant-Appellant (hereinafter referred to as "South African Marine") as contained in their brief (hereinafter referred to as "D/A"), except for the statements that the crate in question did not

outturn at the port of destination (D/A p. 2), and that I.T.O. defended on the grounds that they were not negligent (D/A p. 2).

In relation to the former, no evidence was introduced at the time of trial by either the Plaintiff-Appellant (hereinafter referred to as "Elgie & Co.") or by South African Marine that the crate in question did not outturn ex the S.S. MORGENSTER at the port of destination.

Regarding the latter, I.T.O. defended this third-party action on the grounds that its acts and/or omissions, if any, were not the proximate cause of the loss in question, and that if any loss or damage occurred to the shipment in question it was caused solely by the acts and/or negligence of the ocean carrier, South African Marine.

Third-Party Defendant-Appellee's Counterstatement of Facts

A. Major distortions of both facts and evidence as contained in the defendant-appellant's brief

At the outset it is important to note that contained in the brief submitted for the defendant-appellant, South African Marine, there are many major distortions of both the facts and the evidence presented to and heard before the lower Court at the trial of this action. Said distortions include, but are not limited to, the following:

1. *D/A pp. 3-4 states:*

   "No evidence was produced by I.T.O. that any part of the shipment had been loaded on the MORGENSTER other than the unsigned tally which South African Marine never sees."

   This statement is incorrect since the man who prepared the tally in question, Mr. A. Santisi, was called to the stand and testified that he prepared

the tally for the MORGENSTER (*429a), and that both the tally and his observations clearly showed that the one crate had been loaded aboard said vessel (430a).

2. *D/A p. 4 states:*

"A total of 608 long tons of cargo was loaded on board the S.A. NEDERBURG for Durban, including according to I.T.O., the shipment of optical machinery and accessories."

This statement is incorrect, since I.T.O. has maintained, at all times, that only 11 pieces of the shipment in question were ever loaded aboard the S.S. S.A. NEDERBURG.

3. *D/A p. 5 states:*

"The crate did not outturn from the MORGENSTER at Durban or any other African port."

There was no evidence introduced at the time of trial by either Elgie & Co. or by South African Marine that the crate did not outturn from the MORGENSTER at Durban, South Africa.

4. *D/A p. 7 states:*

"The only evidence that the crate was loaded on the MORGENSTER was an unsigned tally, the *only* unsigned tally for that ship."

There was no evidence introduced at time of trial that the one tally for the MORGENSTER (622a) was the *only* unsigned tally for that ship.

5. *D/A p. 18 states:*

"The District Court found that I.T.O. *was* primarily at fault for failure to load all of the cargo (12 packages) aboard the MORGENSTER."

---

* Reference to pages in Joint Appendix.

The District Court made no such finding, and, in fact, stated:

"While the stevedore *may be* primarily at fault for the failure to load all of the cargo on the MORGENSTER, there is a sharp dispute as to who was responsible for the issuance of an erroneous bill of lading . . ." (23a)

6. *D/A pp. 20 and 21 states:*

"This being true, no entry could possibly be found on the manifest of cargo on board the S.A. MORGENSTER."

There was no evidence introduced at time of trial that the cargo in question was not manifested on board the S.A. MORGENSTER on the voyage in question.

As a result of the foregoing, the Third-Party Defendant-Appellee's counterstatement of facts must be included herein, in order that this Court be advised as to the actual testimony and exhibits which were presented and/or heard before the trial Court in the determination of this matter.

B. Summary Statement of Facts

On March 13, 1974 (160a-161a) there was delivered to the Brooklyn Army Base Terminal (168a) and the Third-party defendant-appellee (I.T.O.) a shipment of 11 cartons and 1 crate which were to be loaded aboard the S.S. MORGENSTER (6a), which was owned and operated by defendant-appellant, South African Marine (293a). Thereafter, one piece of the subject shipment was loaded aboard the S.S. MORGENSTER (I.T.O. Ex. H—622a, 430a-431a, 6a, 20a) and subsequently, the 11 remaining pieces were loaded aboard the S.S. S.A. NEDERBURG (7a), which was also owned and operated by South African Marine (51a).

As alleged by plaintiffs, there was a failure to deliver *one* crate of the subject shipment and, as a result of same, an action was instituted against South African Marine who thereafter impleaded I.T.O., seeking indemnity for either negligence and/or breach of implied warranty of workmanlike service for their failure to load the total shipment aboard the S.S. MORGENSTER and/or their failure to notify the ocean carrier that only 11 pieces were loaded aboard the S.S. S.A. NEDERBURG (D/A pp. 18-24).

At the conclusion of the trial of this action, the lower Court rendered an opinion which held that Elgie & Co. was entitled to recover $500.00 from the ocean carrier, South African Marine, and the lower Court further held that South African Marine was not entitled to indemnity over and against the stevedore, I.T.O. (28a), since the ocean carrier failed to sustain its burden of proving that the loss of the crate in question was proximately caused by the acts and/or omissions of the stevedores (26a-27a).

C. Detailed Statement of Facts

As previously noted, the defendant-appellant (South African Marine) is attempting to recover over and against the third-party defendant-appellee (I.T.O.) for the losses sustained by the plaintiff-appellant (Elgie & Co.) in the above-entitled action and such basis for recovery over is twofold:

1. That I.T.O. failed to load the total shipment aboard the S.S. MORGENSTER (D/A pp. 18-24).
2. That I.T.O. failed to notify the defendant ocean carrier that only 11 pieces were to be loaded aboard the S.S. S.A. NEDERBURG which resulted in the ocean carrier's issuance of an erroneous "on board" bill of lading (D/A pp. 18-24).

In relation to the first ground upon which the defendant ocean carrier is attempting to recover over against I.T.O.,

as stevedore, the facts in evidence in the Court below clearly establishes that after the receipt of a shipment by I.T.O. at the pier, label/labels are normally put on each pallet (360a) which shows the port, ship's name, dock receipt number and the number of pieces contained in the total shipment (318a). As far as the shipment in question is concerned, I.T.O.'s copy of the dock receipt designates the carrying vessel as the S.S. MORGENSTER (Def. Ex. E—596a), and as a result thereof, the label/labels affixed to the shipment in question designated the carrying vessel as the S.S. MORGENSTER (221a). Before the loading of a South African Marine vessel and during the period in question, Captain Palmer, of South African Marine, provided I.T.O. with a plan showing the compartments in which cargo for the various ports were to be loaded. The decision as to what specific cargo to load in a given compartment was that of I.T.O. (327a-328a). The various cargoes were then loaded aboard the designated vessel. However, said loading was not done by specific designation of cargo or by dock receipt (222a), but rather was done in general terms (222a). For example, Captain Palmer testified (222a):

> "Q. Isn't it a fact that you say, for example, 'I want six ton of Durban Cargo on the MORGENSTER Number 6 tweendeck'?
>
> A. No. I say this cargo is allocated for Durban and I want it on there.
>
> Q. I.T.O. would go along the shed and say, 'They want six tons on the MORGENSTER,' and they would put six ton on the MORGENSTER?
>
> A. Yes.
>
> Q. And would that be the normal course of business?
>
> A. Yes."

Therefore, the mere fact that I.T.O. loaded one crate of the shipment in question aboard the S.S. MORGENSTER on March 15, 1974 (I.T.O. Ex. H—622a, 430a-431a) would

not make them liable for any loss sustained, since South African Marine vessels were loaded in general rather than specific terms (222a). Furthermore, the loading of the one piece in question by I.T.O. aboard the S.S. MORGENSTER was in conformity with the shipper's freight forwarder's instructions (191a). Mr. Cantania stated (191a):

> "Q. Sir, in relation to that dock receipt, the dock receipt was prepared or the typewritten portion of that dock receipt was prepared by you; is that correct?
>
> A. Correct.
>
> Q. Would it be fair to say that when you deliver that to a stevedore, that is your instructions to the stevedore based upon what the steamship company told you at the time of booking to load this cargo aboard the MORGENSTER?
>
> A. Yes."

All of the evidence before the trial Court in the determination of this matter clearly shows that *one* piece of the subject shipment was loaded aboard the S.S. MORGENSTER on March 15, 1974 (I.T.O. Ex. H—622a, 430a-431a). Said evidence introduced at time of trial by I.T.O. remains unrebutted by either Elgie & Co. or South African Marine, and, as pointed out by the Court below (25a):

> "Although it would appear that the missing freight did go forward on the S.S. MORGENSTER, no attempt was made by the shipowner to account for the unloading or to establish that the missing crate was not, in fact, aboard the S.S. MORGENSTER."

Therefore, it is clear from all of the facts in evidence that the missing crate was, in fact, loaded aboard the S.S. MORGENSTER in March of 1974 (I.T.O. Ex. H—622a, 430a-431a). Moreover, there is no dispute between the parties of this litigation that the remaining 11 pieces of the subject shipment were loaded aboard (7a) the S.S. S.A. NEDER-

BURG and discharged at the port of Durban on the voyage in question (8a). Based upon these facts, the ocean carrier is now seeking indemnity from I.T.O. based upon their alleged failure to load all 12 pieces aboard the S.S. MORGENSTER in March of 1974 (D/A pp. 18-24).

It is I.T.O.'s contention that this alleged attempt at recovery has no basis, since this alleged failure to load the total shipment aboard the S.S. MORGENSTER was not the proximate cause of the loss of the cargo in question (26a-27a), since the missing crate was loaded aboard a vessel which was owned and operated by South African Marine (293a) and, according to Mr. Minutello of South African Marine's Documentation Department, cargo loaded aboard their vessels "just doesn't disappear" (293a). Therefore, it is clear that the ocean carrier, South African Marine, should be ultimately responsible to the plaintiff herein for any of the alleged damages sustained, since the missing piece was delivered to the ocean carrier's exclusive care and custody and the carrier has offered no explanation as to the cargo's ultimate disposition.

The second theory of recovery of South African Marine against I.T.O. is based upon the fact that I.T.O. failed to notify the defendant-appellant, ocean carrier, that only 11 pieces were to be loaded aboard the S.S. S.A. NEDERBURG on the voyage in question, which allegedly resulted in the ocean carrier's issuance of an erroneous "on board" bill of lading (D/A pp. 18-24). At the outset, it is important to note that a sharp conflict exists as to the method by which I.T.O. notified the ocean carrier in relation to goods which were shut-out, whether intentionally or not (7a). According to Mr. Minutello, who worked in the documentation department of South African Marine (234a), at the completion of loading the S.S. MORGENSTER in March of 1974, I.T.O. forwarded their copy of the dock receipt in a "second" envelope (251a, 254a-255a), in order to notify the ocean carrier that the shipment in question was shut-out

[illegible] S.S. MORGENSTER (251a) and was to be subsequently loaded on the S.S. S.A. NEDERBURG (257a). In contrast, the position of I.T.O. is that at the time the S.S. MORGENSTER sailed in March of 1974 it was their belief that the total shipment, identified in the bill of lading (Pl. Ex. 1—486a), was aboard said vessel (371a-372a, 393a-394a, 413a), and it was not until a subsequent date that it was discovered that part of the shipment in question was, in fact, left on the pier (371a-372a, 393a-394a). The fact that I.T.O. believed that the total shipment was loaded aboard the S.S. MORGENSTER in March of 1974 puts into question the testimony of Mr. Minutello of South African Marine, since there was no need for I.T.O. to forward its copy of the dock receipt, since, in the opinion of I.T.O., the cargo was not shut-out, but rather was loaded aboard the S.S. MORGENSTER (371a-372a, 393a-394a, 413a, 446a).

I.T.O. further contests the *second* envelope theory of Mr. Minutello since:

1. At the time of the sailing of the S.S. MORGENSTER in March of 1974, it was not the practice of I.T.O. to forward their copy of the dock receipt because of prior instances wherein South African Marine had lost I.T.O.'s copy of same (372a, 382a-384a, 409a-410a, 444a).

2. Neither I.T.O. nor South African Marine listed the shipment in question as being shut-out before the S.S. MORGENSTER sailed in March of 1974 (380a-381a).

3. The "hold on dock" orders which were forwarded by South African Marine to I.T.O. during the loading of the S.S. MORGENSTER in March of 1974 do not have any notations for dock receipt No 207 (shipment in suit) (380a-381a) (I.T.O. Ex. I—624a) (446a-447a).

4. I.T.O.'s copy of the dock receipt (Def. Ex. E—596a) was kept in the MORGENSTER file (343a) and not the file of the S.S. S.A. NEDERBURG.

5. I.T.O.'s tonnage log for the S.S. MORGENSTER shows that South African Marine was charged for the shipment in question (470a-471a).

In view of the foregoing, it is clear that a conflict exists between the ocean carrier, South African Marine, and I.T.O. as to the method of notification (7a) and, as pointed out in the trial Court (24a):

> "The evidence failed to resolve this dispute with any certainty."

Therefore, the question still remains whether I.T.O. did, in fact, notify the carrier that only 11 pieces remained on the pier which were to be loaded aboard the S.S. S.A. NEDERBURG in March of 1974. In relation to this issue, the evidence and testimony presented before the trial Court establishes that as a matter of company policy, I.T.O. advised the ocean carrier *on all occasions* when cargo was found to be left on the pier and not loaded aboard a vessel (379a, 411a, 448a-449a).

Furthermore, the testimony of Mr. Ries, the location man for I.T.O., establishes the procedure followed when cargo was found left on the pier (448a-449a). Mr. Ries testified (450a):

> "A. In reference to dock receipt 207? Well, the following ship coming in was the NEDERBURG, and when we were taking the Durban Nederburg cargo out we come upon some drafts of Morgenster cargo dock receipt 207. *Now, when we did that the first thing we do, we put it on the side and we go to the office and we call up the freight department, Matty Percia or Bob Johnson or Dick O'Leary, and we notify them of the*

cargo on the pier and what has happened. And then we put it onto the Nederburg." (Emphasis supplied)

Mr. Ries further testified (449a):

"Q. But you did notify the freight department whatever was remaining on the dock?

A. *Well, we have orders from I.T.O., from the superintendent, that if we find anything, that we must notify the Safmarine's freight department of what we find, so they can get their documentation in order,* because their vessels don't go to the same berths in Africa, they can go to different sheds." (Emphasis supplied)

Therefore, since the shipment was found by Mr. Ries not later than March 22, 1974 (395a-396a, 450a), and furthermore, since the first thing he would do would be to call the freight department of the ocean carrier notifying them that the cargo was on the pier and what had happened (448a), it would be a fair presumption that Mr. Ries, in following I.T.O.'s orders (449a), notified the defendant ocean carrier, South African Marine, not later than March 22, 1974 (395a-396a, 450a), that he had found 11 pieces of the subject shipment (379a, 393a-394a, 448a-449a). Yet, although the freight department of South African Marine had been notified that MORGENSTER cargo had been left on the pier, i.e. 11 pieces (379a, 385a, 393a-394a, 448a-449a) the ocean carrier issued a negotiable bill of lading for 12 pieces (Pl. Ex. 1—486a). Moreover, since the ocean carrier, South African Marine, did not call anyone in the freight department of South African Marine at time of trial one can only conclude that Mr. Ries' testimony was correct and that the ocean carrier had been notified.

Mr. Ries's testimony, relating to the advices given to the ocean carrier of the situation, is also supported by the *ocean carrier's* copy of the dock receipt (Def. Ex. B—

590a), which has a written notation thereon and states:

"Anthony will advise
Anthony said he only had stowage for

11) 2 #4LTD 5 #3 L/H ,,
) 4-5

Mr. Minutello testified that Mr. Kasta, South African Marine's claims manager (473a), put this written notation on the ocean carrier's copy of the dock receipt (250a), which clearly shows that the ocean carrier had knowledge that *only 11 pieces* were loaded aboard the NEDERBURG (Def. Ex. B—590a). However, even though Mr. Kasta testified on behalf of the defendant, South African Marine, at the trial of this action (472a), the attorney for the defendant ocean carrier never asked or inquired as to this handwritten notation on the ocean carrier's copy of the dock receipt (Def Ex. B—590a), nor did the attorney for the ocean carrier inquire as to when this notation was made. Therefore, one can only assume that inquiries of this nature could only act to the detriment of the ocean carrier's alleged defense to this action, and that, *as per the notation* (Def. Ex. B—590a), I.T.O. did in fact notify the ocean carrier that only 11 pieces were loaded aboard the S.S. S.A. NEDERBURG on the voyage in question. Yet, even with this knowledge, South African Marine issued a negotiable on board bill of lading for the full quantity of the shipment, i.e. 11 cartons and one crate (Pl. Ex. 1—486a).

In conclusion, since both Elgie & Co. and South African Marine admitted that 11 pieces of the subject shipment were loaded on and discharged by the SS. S.A. NEDERBURG at Durban, and furthermore, since the testimony of Mr. A. Santisi of I.T.O. remains unrebutted, i.e. that "one" piece of the subject shipment was loaded aboard the S.S. MORGENSTER in March of 1974 (430a, I.T.O. Ex. H—622a), it is I.T.O.'s contention that the ocean carrier should be ultimately responsible for the damages sustained by the

Plaintiff, since:

1. the missing piece was delivered to their exclusive care and custody and they have offered no explanation as to its ultimate disposition, and;
2. the acts and omissions of I.T.O., if any, were not the proximate cause of the damages complained of.

Question Presented

1. Was the Court below correct in holding that South African Marine was not entitled to indemnity or attorneys' fees from I.T.O. (22a)?

POINT I

The ultimate responsibility for the loss in question must be borne by the ocean carrier, South African Marine, since the alleged crate that was lost was loaded aboard their vessel.

All of the evidence before the trial Court in the determination of this matter clearly shows that missing piece of the subject shipment (6a) was loaded aboard the S.S. MORGENSTER on March 15, 1974 (I.T.O. Ex. H—622a, 430a-431a). Said evidence introduced at time of trial by I.T.O. remains unrebutted by either Elgie & Co. or South African Marine, and, as pointed out by the Court below (25a):

> "Although it would appear that the missing freight did go forward on the S.S. MORGENSTER, no attempt was made by the shipowner to account for the unloading or to establish that the missing crate was not, in fact, aboard the S.S. MORGENSTER."

Therefore, it is clear from all of the facts in evidence that the missing crate was, in fact, loaded aboard the

S.S. MORGENSTER in March of 1974 (I.T.O. Ex. H—622a, 430a-431a). Moreover, there is no dispute between the parties of this litigation that the remaining 11 pieces of the subject shipment were loaded aboard (7a) the S.S. S.A. NEDERBURG and discharged at the port of Durban on the voyage in question (8a).

In view of the foregoing, it is I.T.O.'s contention that since the crate in question was loaded aboard the S.S. MORGENSTER on March 15, 1974 (I.T.O. Ex. H—622a, 430a-431a), and delivered to the care and custody of South African Marine (293a), who both owned and operated the S.S. MORGENSTER and testified at the time of trial that cargo loaded aboard their vessels "just doesn't disappear" (293a), have become bailees of the cargo and failing to explain the cause of the loss must be liable for the damages complained of, *David Crystal Inc.* v. *Cunard Steamship Co.*, 339 F.2d 295 (2nd Cir. 1964).

Furthermore: 1. since one crate was loaded aboard the S.S. MORGENSTER (I.T.O. Ex. H—622a, 430a-431a) which was in the exclusive control of the defendant, South African Marine (293a), 2. since the stevedores alleged loading one crate aboard the S.S. MORGENSTER was not the proximate cause of the loss (26a-27a), 3. and furthermore, since a loss of a crate would not normally occur in the absence of the ocean carrier's negligence (293a), I.T.O. is entitled to a presumption of negligence against the ocean carrier for the loss complained of, pursuant to the doctrine of "res ipsa loquitur", Prosser, William L., *Law of Torts* (4th Ed. 1971) p. 214.

In conclusion, the sole liability of South African Marine for the loss in question is best stated in the Reply Brief for the plaintiff-appellant, wherein its is stated on page 7:

> "Who could be in a better position to state that it believed that the cargo did not go on the 'MORGENSTER', and did not outturn from the 'MORGENSTER', than the steamship carrier itself, which had custody and control

of the cargo? Had the one crate gone forward on the 'MORGENSTER' and been delivered to Elgie—even though it was under a false bill of lading—there would be no loss, and therefore, no lawsuit."

POINT II

There is no implied warranty of workmanlike service/performance and the rights and liabilities of both the stevedore and ocean carrier are governed by the terms and conditions of the contract which was in force and effect during the voyage in question.

In the case at bar the ocean carrier, South African Marine, is seeking indemnity from I.T.O., as stevedore, and alleges that I.T.O. breached their implied warranty of workmanlike service, and thereby caused the loss complained of (D/A pp. 18-24). On the other hand, I.T.O. contends that the stevedoring contract excludes "warranties of any nature" (I.T.O. Ex. G—620a), including any implied warranty of workmanlike service, and that the responsibility of I.T.O. vis-a-vis the ocean carrier is strictly limited to the stevedoring contract (I.T.O. Ex. G—620a), to which both parties agreed to be bound, *Stein Hall & Co. Inc.* v. *S.S. Concordia Viking*, 494 F.2d 287 (2nd Cir. 1974), *David Crystal Inc.* v. *Cunard Steamship Co.*, 339 F.2d 295 (2nd Cir. 1964), and it is I.T.O.'s position that the stevedoring contract (I.T.O. Ex. G—620a), effectively excludes any warranty of workmanlike service by the express language of Clause No. 18. Said clause provides (I.T.O. Ex. G—620a):

> "18. Entire Agreement. This contract constitutes the full agreement between the parties hereto *and no warranty of any nature shall be implied* from any of the wording of this agreement."

Clause No. 18 of the stevedoring contract (I.T.O. Ex. G—620a) is clear and unambiguous, and this Court should

not now add an additional provision to said contract, i.e. an implied warranty of workmanlike service, since it was never the purpose of Courts to amend contracts to which the parties agreed to be bound, but rather is to enforce contracts which clearly show the obligations of the parties, *Arena Athletic Club* v. *McPartland,* 58 N.Y. Supp. 477 (2nd Dept. 1899). Moreover, it has been held that Courts may not interpret contracts in such a manner that the intent of the parties is frustrated, *Mailer* v. *RKO Teleradio Pictures Inc.,* 332 F(2d) 747 (2nd Cir. 1964). As was held in *United States Nav. Co. Inc.* v. *Black Diamond Lines Inc.,* 147 F(2d) 958, 961 (2nd Cir. 1945):

> "It is well settled that parties who undertake to contract are bound, if the clear meaning of the words used shows an agreement, *without regard to any secret reservations which either may have entertained, for the only relevant intent in such circumstances is* the intent to say *what they did say.* National Pub. Co. v. International Paper Co. 2 Cir. 269 F. 903; Eustis Mining Co. v. Beer, Sondheimer & Co. Inc., D.C., 239 F. 976; C.H. Pope & Co. v. Bibb Mfg. Co., D.C., 290 F. 586. See Corbin, The Parole Evidence Rule (1944), 53 Yale L.J. 603." (emphasis supplied)

Therefore, since Clause No. 18 of the stevedore contract specifically excludes "warranties of any nature" (I.T.O. Ex. G), this Court cannot add any additional terms, including an alleged implied warranty of workmanlike service, since the Court would be formulating a new contract to which the parties did not agree to be bound, *Arena Athletic Club* v. *McPartland, supra.*

In view of the foregoing, the ocean carrier's action for recovery over against I.T.O., which is based upon an alleged breach of a warranty of workmanlike service (D/P pp. 18-24), is clearly misplaced, and the right of action, if any, must be based upon the stevedoring contract (I.T.O. Ex. G--620a), since it governs the relationship between the

parties, *Stein Hall & Co. Inc.* v. *S.S. Concordia Viking, supra, David Crystal Inc.* v. *Cunard Steamship Co., supra.* Moreover, the burden of proof is on the ocean carrier to show that I.T.O. did, in fact, breach the stevedoring contract, *C.J.S. Contracts*, Vol. 17A § 578.

The terms of the contract (I.T.O. Ex. G—620a) expressly provides, in Clause No. 5, that I.T.O.'s responsibility for cargo loss or damage is limited to "physical damage" caused by negligence or fraud. Although the claim interposed by the plaintiff does not involve "physical damage" (40a-44a), this Court will in all likelihood interpret the complaint (40a-44a) to be sufficiently broad to cover the loss in question. Therefore, pursuant to the terms and provisions of the stevedoring contract (I.T.O. Ex. G—Clause No. 5—620a), the ocean carrier has the burden of proof to show:

a. In relation to alleged negligence the carrier must establish that the stevedores alleged negligent act was the proximate cause of the loss, *Saugerties Bank* v. *Delaware & Hudson Co.*, 236 N.Y. 425 (Court of App., 1923).

b. In relation to alleged fraud the carrier must show that the stevedore: 1. made a material misrepresentation of a fact, 2. that at the time of the misrepresentation I.T.O. had knowledge of its falsity, 3. injury, *Channel Master Corp.* v. *Aluminum Ltd.*, 4 N.Y. 2d 403 (Court of App. 1958).

There was no allegation of nor proof tendered, at the time of trial, by the defendant ocean carrier relating to any alleged material misrepresentation made by I.T.O. with the requisite knowledge of its falsity, *Channel Master Corp.* v. *Aluminum Ltd., supra,* and it must be assumed that the entire basis upon which the defendant ocean carrier is seeking indemnification from the third-party defendant, I.T.O., is based upon the theory of negligence in the performance of their duties.

The record indicates that 11 pieces of the shipment in question were delivered ex the S.A. NEDERBURG at the port of Durban (7a-8a), and the testimony and exhibits introduced at time of trial by I.T.O. clearly establishes that the missing piece (20a) was loaded aboard the S.S. MORGENSTER in March of 1974 (20a, I.T.O. Ex. H—622a, 430a). Therefore, the only issue remaining is whether I.T.O. should be held responsible to the plaintiff for the loss of the missing crate. As to this issue, the ocean carrier, in their brief (D/A pp. 18-24), asserts that I.T.O. improperly performed their duties by not loading the total shipment of 12 pieces aboard the MORGENSTER in March of 1974, and further alleges that I.T.O. improperly performed their duties by not notifying the ocean carrier that only 11 pieces of the shipment in question were loaded aboard the S.A. NEDERBURG.

As to the first allegation, the testimony clearly shows that the crate in question was loaded aboard the MORGENSTER (20a, I.T.O. Ex. H—622a, 430a), a vessel owned and operated by the ocean carrier, South African Marine (293a), which, according to their own witness, should not just disappear (293a). To this date, there has never been an explanation by the ocean carrier as to what happened to the piece which was loaded aboard the MORGENSTER (25a), and it is I.T.O.'s contention that the ocean carrier became bailees of the missing piece (20a) and, failing to explain the cause of the loss in question, should be found liable, *David Crystal Inc.* v. *Cunard Steamship Co., supra.*

Moreover, in relation to the second allegation, i.e. that I.T.O.'s failure to notify the ocean carrier that only 11 pieces were loaded aboard the S.A. NEDERBURG, the testimony and exhibits introduced at the trial clearly show that the ocean carrier was, in fact, notified on all occasions when cargo was left on the pier (379a, 411a, 448a-449a). The most damaging evidence intorduced at trial, as to the knowledge of the ocean carrier, is reflected in the

ocean carrier's copy of the dock receipt (Def. Ex. B—590a) which, on its face, shows that only 11 pieces were loaded aboard the S.A. NEDERBURG. Yet, even with this knowledge, the ocean carrier issued a bill of lading for 12 pieces (Pl. Ex. 1—486a).

It is clear that the only party who can be held liable for the loss complained of is the ocean carrier, South African Marine. The ocean carrier has simply failed to sustain the burden of proving that the proximate cause of the loss was occasioned by the stevedore's negligence (26a-27a), and its claim over against I.T.O. must be dismissed, *Saugerties Bank* v. *Delaware & Hudson Co., supra.*

In relation to the foregoing issue, the trial Court, in its decision, stated (26a-27a):

> "In the final analysis, we must conclude that both the ocean carrier and the stevedore were, to some degree, negligent and responsible for the issuance of an erroneous bill of lading. However, the burden of proof is on the ocean carrier to show that the stevedore breached its contract. See 17 A CJS Contracts § 578. Moreover, since the terms of their contract limited the liability of the stevedore to fraud or negligence which causes the cargo loss, and since the ultimate loss was not due to the issuance of the erroneous bill of lading, it would appear that the ocean carrier has not met its burden of proving that the stevedore's negligence was the proximate cause of the loss."

The appellant-ocean carrier has not shown that the trial Court's decision was clearly erroneous and has further failed to show that the trial Court committed a mistake of law in rendering its decision, therefore, the holding of the Court below should be affirmed.

POINT III

Assuming arguendo, that there is an implied warranty of workmanlike service from the stevedore to the ocean carrier, the ocean carrier's claim for indemnity must still be dismissed, since they have failed to sustain their burden of proof.

Assuming arguendo, that in addition to the stevedoring contract between the stevedore, I.T.O., and the ocean carrier, South African Marine (I.T.O. Ex. G—620a), there is an implied warranty of workmanlike performance which inures to the benefit of the ocean carrier, it is still I.T.O.'s contention that any act and/or omission of the stevedore is not the proximate cause of the loss in question.

The leading case relating to an implied warranty of workmanlike service from a stevedore to an ocean carrier is *Ryan Stevedoring Company, Inc.* v. *Pan-Atlantic Steamship Corporation,* 76 S.Ct. 232 (1956). In that case the Supreme Court of the United States held that there is a warranty of workmanlike service/performance implied in law, and held that the stevedore is obligated to properly perform their duties in a workmanlike manner or be held liable for the damages sustained. This decision affirms the lower Court decision, 211 F.2d 277 (2nd Cir. 1954), which held that the stevedore who breached its implied warranty of workmanlike service is liable for damages, if the breach was the sole "active and primary" cause of the incident. The holding in *Ryan Stevedoring Company, Inc.* v. *Pan-Atlantic Steamship Corporation, supra,* as to the shipowner's rights to indemnity on the theory of implied warranty is further amplified in the case of *Garner* v. *Cities Service Tankers Corporation,* 456 F(2d) 476 (5th Cir., 1972), wherein the Court set forth requirements which were necessary before an ocean carrier is entitled to indemnity over against the stevedore for a breach of implied warranty of workmanlike service. Said decision states on

p. 481:

> "(1) whether the warranty of workmanlike performance was breached; (2) whether that breach proximately caused the injury; and (3) whether the shipowner's conduct prevented the workmanlike performance. *David,* 353 F.2d 666; *Southern Stevedoring & Contracting Co.* v. *Hellenic Lines Ltd.,* 388 F.2d 267, 271-272 (5th Cir. 1968).
>
> * * *
>
> In any case the stevedore's negligence is immaterial unless it is a breach of the contractual warranty of workmanlike performance and is the proximate cause of the longshoreman's injuries. *David,* 353 F.2d at 664."

See also *LeBlanc* v. *Two-R Drilling Co.,* 527 F.2d 1316 (5th Cir., 1976).

In view of the foregoing, it is clear, as with a claim based upon negligence, that there must be a causal relationship between the damages complained of and the stevedore's alleged act of misconduct, whether the claim over involves negligence, *Saugerties Bank* v. *Delaware & Hudson Co., supra,* or whether the claim involves a breach of the stevedore's implied warranty of workmanlike service, *Garner* v. *Cities Service Tankers Corp., supra, LeBlanc* v. *Two-R Drilling Co., supra.* Moreover, the burden of proof is upon the ocean carrier to establish that the proximate cause of the loss complained of was a result of either the stevedore's negligence, *Saugerties Bank* v. *Delaware & Hudson Co., supra,* or the stevedore's breach of implied warranty of workmanlike service, *LeBlanc* v. *Two-R Drilling Co., supra, Garner* v. *Cities Service Tankers Corp., supra.*

The holding of the trial Court, although it appears to be based upon negligence alone (26a-27a), would still be applicable to, and require the dismissal of, the ocean car-

rier's claim over against I.T.O. for an alleged breach of the stevedore's warranty of workmanlike service, since the ocean carrier has failed to sustain their burden of proof to establish that the loss complained of was the proximate cause of the acts and/or omissions of the stevedore, I.T.O. (26a-27a). Therefore, the ocean carrier's claim for indemnity against I.T.O., whether based upon the theory of negligence and/or upon the theory of breach of implied warranty of workmanlike service, must be dismissed, *Saugerties Bank* v. *Delaware & Hudson Co., supra, LeBlanc* v. *Two-R Drilling Co., supra, Garner* v. *Cities Service Tankers Corp., supra.*

POINT IV

Defendant ocean carrier's failure to call someone in the Freight Department of South African Marine, and failure to obtain testimony regarding a notation on the ocean carrier's dock receipt, which shows only 11 pieces were loaded on the S.S. S.A. Nederburg, should create an unfavorable inference.

At the trial of this action there was testimony by I.T.O. that the ocean carrier's freight department was always advised if cargo was left on the pier (379a, 411a, 448a-449a), and furthermore, Mr. Ries testified that it was the standard practice of I.T.O. to always call Matty Percia, Bob Johnson or Dick O'Leary, in South African Marine's freight department and advise them what had happened to cargo found (448a-449a). Yet, the ocean carrier failed to call anyone in the freight department at time of trial to show that South African Marine was never notified of the situation. Moreover, even though Mr. Kasta of South African Marine's Claim Department was called at time of trial, the attorney for the ocean carrier never asked him about the written notations he made (250a) on the ocean carrier's dock receipt (Def. Ex. B—590a), which

evidences South African Marine's knowledge that only 11 pieces were loaded on the S.S. S.A. NEDERBURG.

In relation to the foregoing, it is well settled that if a party neglects to procure testimony which is within his power to procure this affords a basis for an inference adverse to him, *The Mincio,* 1936 AMC 1765 (S.D.N.Y. 1936). See also *The Manitou,* 116 F. 60 (S.D.N.Y. 1902), *The Algie,* 56 F(2d) 388 (E.D.N.Y. 1932), *The President Polk,* 43 F(2d) 695 (2nd Cir. 1930).

An inference, adverse to both the plaintiff, Elgie & Co., and the defendant, South African Marine, should also be drawn, since neither the plaintiff nor the defendant ocean carrier introduced any testimony or other proof that the S.S. MORGENSTER did not discharge and deliver one piece at the port of Durban on the voyage in question, *The Mincio, supra, The Manitou, supra, The Algie, supra, The President Polk, supra.*

POINT V

Defendant's, South African Marine claim for counsel fees should be denied.

As previously pointed out, it is I.T.O.'s contention that the proximate cause of the plaintiff's loss was not caused by any act and/or omission of I.T.O. in the performance of their duties. Therefore, if this Court agrees with I.T.O.'s contention there is no basis upon which South African Marine's claim for counsel fees can be granted. However, in the event this Court reverses the decision of the trial Court, the question then arises as to whether or not the ocean carrier, South African Marine, would be entitled to counsel fees as against I.T.O., as stevedore.

In relation to this issue, the trial Court, after reviewing all the testimony and exhibits, held (27a):

> "This leaves only the question of counsel fees as between the defendant and third-party defendant. It

is well established that the allowance of counsel fees is within the discretion of the court. *Rogers* v. *United States Lines Company,* 303 F.2d 295, 299 (3rd Cir. 1962). Since we conclude that each party's negligence contributed to the defendant's liability, it would be inappropriate to give either attorney's fees under these circumstances.[11] *Toyomenka, Inc.* v. *S.S. Tosaharu Maru,* 392 F.Supp. 450 454 (S.D.N.Y. 1974), *reversed* on other grounds, 523 F.2d 518 (2d Cir. 1975)"

Footnote No. 11 (32a), which is referred to in the Court's decision (27a), states:

"11 The defendant did not tender the admitted liability of $500 to the plaintiff. The third-party defendant did make such a tender to both the defendant and the plaintiff on November 12, 1975, as part of an offer of judgment pursuant to Rule 68, F.R.Civ. P. (Neither party accepted this offer)"

In addition to the foregoing, if this Court should find that the stevedoring contract (I.T.O. Ex. G—620a) *alone* governs the relationship between I.T.O. and the ocean carrier, the ocean carrier's claim for indemnity and counsel fees must be denied, since their concurrent negligence (27a) caused the loss in question, *Amerocean Steamship Company* v. *Copp,* 245 F(2d) 291 (9th Cir. 1957), *McFall* v. *Compagnie Maritime Belge,* 1952 A.M.C. 1860, 304 N.Y. 314 (1952). On the other hand, if this Court finds that I.T.O. did, in fact, breach its implied warranty of workmanlike service, which caused the loss in question, then the defendant ocean carrier's claim for attorney's fees should still be denied on equitable principles. This latter contention is based upon the fact that I.T.O. made an offer of judgment in the amount of $500.00 to both the plaintiff and the ocean carrier which neither party accepted, and also is based upon the fact that the trial Court

found the ocean carrier concurrently negligent (27a), *Farrell Lines Inc.* v. *Carolina Shipping Company,* 498 F(2d) 1397 (4th Cir., 1974) 1974 AMC 1178. In that case the ocean carrier sought indemnity and counsel fees from a stevedore for an alleged breach of an implied warranty of workmanlike service, and the Court held that the ocean carrier was entitled to indemnification, however, the claim for attorney's fees was denied, since the ocean carrier's negligence contributed to the loss. On page 1182 the Court stated:

> "The plaintiff shipowner, also, complains of the denial by the District Court of recovery on its part of attorney's fees and costs. The District Court based such denial on the fact that a part of the fault in this case was attributable to the ship itself and that, under those circumstances, it was inequitable to permit the shipowner to recover the expenses to which it was subjected, in defending the longshoreman's action against it from the stevedore. While this ruling, based as it is on the decision in Gilchrist v. Mitsui Sempaku K.K. (3 Cir., 1968) 405 F.2d 763, cert. denied 394 U.S. 920, represents an equitable modification of the normal rule of indemnification, the District Court did not commit error in adopting it under the unique facts of this case."

In any event, the appellant-ocean carrier has failed to show that the trial Court has abused its discretion in denying their claim for attorney's fees, therefore, the holding should be affirmed.

CONCLUSION

The judgment of the District Court should be affirmed, with costs.

Respectfully submitted,

HILL RIVKINS CAREY LOESBERG & O'BRIEN
Attorneys for Third-Party
Defendant-Appellee
[illegible] Fulton Street
New York, New York 10038

Of Counsel:

ROBERT E. DALEY

Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 14th day of MARCH 1977

Haight, Gardner, Poor & Havens
Attorneys for PLAINTIFF-APPELLANT

Bishop, Englar, Jones & Hanstine
ATTORNEYS FOR DEFENDANT-APPELLEE
AND THIRD PARTY PLAINTIFF-APPELLANT